SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 452

MARTIN MARIETTA CORPORATION, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Martin Marietta Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on April 11, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra,* pp. 4a-10a), is reported at 376 F.2d 430. The Federal Trade Commission's "Order Granting In Part, and Denying In Part, Application For Modification Of Order To Cease And Desist" (R. 135-136)[1] is not yet reported; the Commission rendered no opinion.

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[1] "R." refers to the one-volume Joint Appendix printed for use in the court of appeals.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 11a) was entered on April 11, 1967. Rehearing was denied on May 8, 1967 (App. D, *infra*, p. 12a). The final decree of the court of appeals (App. E, *infra*, p. 13a) was entered on May 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether action of the Federal Trade Commission in denying motions to modify final consent orders is, *under any and all conceivable circumstances*, absolutely immune from judicial review.

STATUTES INVOLVED

The statutory provisions involved are Section 5(b) of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, as amended, 73 Stat. 243, 15 U.S.C. § 21(b), whose terms are identical in all important respects. Section 5(b) of the Federal Trade Commission Act, in pertinent part, provides:

> After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a re-

opening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Also involved are Sections 2.33 and 3.72(b) of the Federal Trade Commission's Rules of Practice, 32 Fed. Reg. 8448, 8455 (1967) (App. A, *infra*, pp. 1a-3a).[2]

STATEMENT

On January 27, 1961, the Federal Trade Commission issued a complaint (R. 1-16) against Martin Marietta Corporation charging that its acquisition of certain concrete pipe, cement, lime and construction aggregate (crushed stone) properties violated Section 7 of the Clayton Act, 64 Stat. 1125, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C. § 45. Negotiations led to disposal of the case by consent agreement (R. 37-45), effectuated by order of the Commission on March 12, 1963 (R. 62-69).

The Commission's order required petitioner to divest sixty-one concrete pipe plants, thirteen construction aggregate quarries and two lime plants.[3] Peti-

[2] A general revision of the Commission's Rules of Practice became effective July 1, 1967, 32 Fed. Reg. 8444-8460 (1967), superseding 16 C.F.R. §§ 1.1-4.5 (Supp. 1966). Insofar as pertinent here, the revisions change only the section numbers and not the substance of the old rules. Accordingly, citations herein are to the revised rules.

[3] The order also contained provisions prohibiting petitioner, for a period of ten years, from acquiring any concrete pipe plant anywhere in the United States, any lime plants east of the Mississippi River, and any aggregate plants in seven specified states. The order also prohibited the company, for a period of seven years, from acquiring any company engaged in the production or sale of cement in any states east of the eastern borders of Idaho, Utah and Arizona.

tioner divested the concrete pipe plants, the lime plants and five of the thirteen aggregate properties.[4]

In September 1964, petitioner moved the Commission to modify its order by deleting from its divestiture terms the eight quarries not yet divested on the ground that factual and economic conditions had so changed as to make divestiture of these quarries unwarranted and incompatible with the public interest (R. 70-87).[5] In the motion, petitioner set forth substantial and detailed allegations of these changed conditions. In January 1965, the Commission's Bureau of Restraint of Trade responded to petitioner's motion, challenging petitioner's claims and putting into sharp dispute virtually every fact and conclusion alleged (R. 87-97). In March 1965, petitioner filed a reply (R. 99-121) and, as the court of appeals noted, requested opportunity for hearing before any final unfavorable action was taken (App. B, *infra,* p. 5a).

Approximately nine months thereafter, petitioner was advised by letter from the Bureau that its motion was under consideration and was invited to submit "current data affecting the economic environment of the eight quarry sites involved." In December 1965, petitioner filed a supplement to its reply (R. 122-135) and again renewed its request to be heard by the Commission (R. 134).

On January 12, 1966, the Commission, without having provided an opportunity for hearing, and without findings or opinion, entered its "Order Granting in

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[4] These divested plants and properties had a combined book value of approximately $41,300,000.

[5] The book value of these eight properties is approximately $3,000,000.

Part, and Denying in Part, Application for Order to Cease and Desist" (R. 135-36). By this order, the Commission reopened and modified the original order, deleting one quarry from the list of those required to be divested, but denied petitioner's motion as to the remaining quarries, stating simply that "there has been no showing made that changed conditions of fact or law or the public interest warrant modification . . ." (R. 135-36). Petitioner promptly moved for reconsideration, specifically requesting an evidentiary hearing for resolution of the factual issues placed in dispute by the Bureau (R. 136-38). This motion, too, was denied; the Commission cursorily stating that "even if the facts set forth by [petitioner] in its application to modify the consent order are taken as true, there has been no showing made that changed conditions of fact or law or the public interest warrant modification . . ." (R. 139).

Relying upon the review provisions of Section 5(b) of the Federal Trade Commission Act and Section 11(b) of the Clayton Act petitioner sought review by the court of appeals of the Commission's action in denying modification as to seven of the eight quarries remaining to be divested. Petitioner contended before the court of appeals (1) that the Commission erred in failing to accord an evidentiary hearing on its petition for modification; (2) that the Commission erred in failing to support its action with findings and an adequate exposition of the bases of its order; and (3) that the Commission's denial was arbitrary, capricious and clearly erroneous in light of its purported acceptance of all factual allegations made by petitioner as true. These questions were not decided by the court of appeals. Instead, a two member majority of the

panel dismissed the review petition, holding that the statutory provisions do not authorize "review by courts of appeals of any action of the Commission denying a motion to reopen or modify a final order" (App. B, *infra,* p. 7a), that "review must . . . confine itself to the modifying order, more specifically, to that portion of the order which effects changes in the original order" (App. B, *infra,* p. 7a), and that "petitioner has no right to . . . review" of "the Commission's refusal to grant the petitioner a hearing with respect to" the modifications requested but denied (App. B, *infra,* p. 8a).

Misconstruing the basis of petitioner's petition for review and contrary to all precedent, the majority additionally refused review of the Commission's action denying modification on the ground that, since the original order was a consent order, petitioner had "waived its objections to the terms of the order" and could not therefore, regardless of the circumstances, object to or obtain review of the Commission's action (App. B, *infra,* pp. 8a-9a).

Dissenting from the majority view, Judge Schnackenberg agreed that procedural irregularities vitiated the Commission's order, stating: "Because of the unusual manner in which the Commission disposed of Martin Marietta Corporation's petition, without a hearing, I feel that the spirit as well as the letter of the law were violated." (Citing the three applicable statutes and the Federal Trade Commission Rule of Practice guaranteeing the right to a hearing) (App. B, *infra,* p. 10a).

By a vote of five to three, petitioner's petition for rehearing *en banc* was denied; Judges Schnackenberg, Kiley and Cummings voted to grant rehearing (App. D, *infra,* p. 12a).

REASONS FOR GRANTING THE WRIT

1. The court of appeals' construction of the review provisions of Section 5(b) of the Federal Trade Commission Act and Section 11(b) of the Clayton Act, and its absolute disclaimer of authority to review *any* order of the Federal Trade Commission denying modification of final orders—regardless of the circumstances or of the grounds presented—creates a serious issue of immediate and widespread importance in the administration of the antitrust laws. As the holding applies universally to *all* consent orders, the importance of the issue is of particular significance to the consent order procedure.

Seventy to eighty percent of all of the antitrust actions initiated by the Department of Justice and the Federal Trade Commission during the last thirty years have been concluded by the entry of consent decrees. See Note, 80 Harv. L. Rev. 1303; 1327, n. 157 (1967). Thus, the pattern of competition in major industries in this country is determined to a significant degree by antitrust consent decrees of the two enforcement agencies. It is, therefore, of paramount significance for the parties to consent decrees to know under what circumstances such decrees may be modified and what rights and procedures are provided for when modification is sought.

With the constant change in industrial patterns of production and distribution, the expansion and contraction of economic conditions, and the continuous change in scientific technology, market conditions in many industries today little resemble those existing even ten years ago. When businessmen enter into consent orders—or when litigated orders are entered against their firms—there is an acute awareness of the

ever changing conditions under which they must operate. They know that absolute restrictions and absolute prohibitions, with no recourse, might well become an unwarranted—and perhaps even an anticompetitive—shackle.[6] However, until the holding of the majority in this case, it was the understanding of the antitrust bar that some meaningful recourse to the Federal Trade Commission, and to the courts on review, was available in the event changed conditions should render today's reasonable order completely unreasonable in the future, and for many years consent orders have been agreed to with this understanding.

This understanding and reliance has been founded upon the language of the Federal Trade Commission Act (Section 5(b)) and the Clayton Act (Section 11(b)) specifically providing for modification of final orders in the event conditions of fact or of law so changed as to warrant such, or in the event the public interest so required. Implementing these statutory provisions, and further justifying this reliance, the Commission's Rules of Practice include specific provisions governing the procedure by which final orders

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[6] This basic problem is recognized in a recent Note, *Flexibility and Finality in Antitrust Consent Decrees,* 80 Harv.L.Rev. 1303, 1305 (1967):

> The most serious problem with consent decrees arises from the use in most of them of injunctive provisions of indefinite duration; with the passage of time, some of these seem increasingly oppressive to one or both parties. Defendant may feel that technological innovation, increases in competition, or other changes in circumstance make the decree an unwarranted—and perhaps even an anticompetitive—burden. The Government may think that the decree does not effectively serve the purposes of the antitrust laws. Thus there are pressures to adjust consent decrees to fit the changing needs of the parties and conditions of the market.

can be modified, on the motion of the Commission or of the party subject to the order,[7] and provide that consent orders "may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders."[8] Additionally, provision for modification of consent agreements is regularly incorporated into the agreements themselves, as was done here (R. 38).

Despite the importance and necessity of the modification provisions and the reliance placed thereon, the majority below has now rendered these provisions virtually meaningless by its ruling that the Commission is vested with complete and absolute discretion in dealing with petitions to modify and that, regardless of procedural irregularities and violation of the statutory requirements, or of the gravity of the grounds presented for modification, or of the egregiousness of the Commission's action, no recourse whatsoever to the courts of appeals is available.

Section 5(b) of the Federal Trade Commission Act, in terms identical in all important respects with Section 11(b) of the Clayton Act, provides in pertinent part:

> After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the

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[7] Federal Trade Commission Rules of Practice, Section 3.72(b), 32 Fed. Reg. 8455 (1967), App. A, *infra*, pp. 1a-3a.

[8] Federal Trade Commission Rules of Practice, Section 2.33, 32 Fed. Reg. 8448 (1967), App. A, *infra*, p. 1a.

> Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section* (emphasis added).

It is petitioner's contention that this review provision means precisely what it says; that once a final order is reopened on petition to modify, as was indisputably done here,[9] an order entered after reopening, whether it be a modified order or an order denying or granting modification, is subject to review in the appropriate court of appeals.[10] The majority below, however, adopted a contrary and extremely narrow construction, holding (App. B, *infra*, p. 7a):

> The "review" which may be obtained under this section is a review of the "order entered after

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[9] After considering petitioner's motion for reopening and modification, the Commission reopened the proceeding, modified the order by deleting one quarry from the list of those to be divested, and denied modification as to the other seven.

[10] See *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (4th Cir. 1944). There, the Commission had declined to entertain a petition to stay enforcement of a cease and desist order on the ground that it believed itself without power to do so. The party against whom the order had been issued petitioned the court of appeals to direct the Commission to consider and decide the merits of the motion. Holding that Section 5 of the Federal Trade Commission Act granted it the "power . . . to direct the Commission to give consideration to a motion for a modification of one of its orders" (*Id.* at 912), the court directed the Commission to consider and pass upon the motion.

> . . . reopening," not a review of the original order.[11] The review must therefore confine itself to the modifying order, more specifically, to that portion of the order which effects changes in the original order. * * * The portion of an "order entered after . . . reopening" which refuses any further modification of the original order is not reviewable.

Thus, reduced to its essentials, the majority's holding is that a petitioner for modification is entitled to a review of the portions of a request with which the Commission is in *agreement,* but has no recourse on those portions with which the Commission is in *disagreement* or on the procedural manner in which the request is treated, regardless of the gravity of the errors claimed. Such a "right" of review would be meaningless and absurd.

The question presented is one of obvious and substantial importance which has not been, but should be, decided definitively by this Court. The need for review of the Commission's action is emphasized by the fact that the Commission, in treating motions for modification, functions in a combined prosecutorial-judicial capacity. Petitioner believes the factual allegations set forth in its pleadings presented a *prima facie* case for granting the modification requested,[12]

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[11] Petitioner, of course, did not seek review of the "original order." The review requested was that of the Commission's action, and the procedural irregularity of that action, in partially denying the modification requested.

[12] On the basis of numerous primary fact assertions of changed conditions, petitioner contended that divestiture of the quarries in question would actually diminish competition in the affected areas, would result in granting a competitor a monopoly position, and would be wholly contrary to the public interest.

and that, given a hearing, the need for modification could have been conclusively demonstrated. As the court of appeals noted, petitioner sought review below, *inter alia,* "of the Commission's refusal to grant the petitioner a hearing . . ." (App. B, *infra,* p. 8a). While the majority did not reach the question of petitioner's right to a hearing, Judge Schnackenberg, dissenting, agreed that this right existed and believed that "because of the unusual manner in which the Commission disposed of Martin Marietta Corporation's petition, without a hearing, . . . the spirit as well as the letter of the law were violated," citing Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b); Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b); Sections 5, 7 and 8 of the Administrative Procedure Act, 60 Stat. 239, 241, 242, 5 U.S.C. §§ 1004, 1006, 1007; and Section 3.28 (now Section 3.72) of the Federal Trade Commission's Rules of Practice (App. B, *infra,* p. 10a).

Section 5(b) of the Federal Trade Commission Act and Section 11(b) of the Clayton Act provide that the Commission "may at any time, *after notice and opportunity for hearing,* reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . ." (emphasis added). Sections 5, 7, and 8 of the Administrative Procedure Act make clear that the hearing required by these statutes is to be an evidentiary hearing.

The statutory specifications are implemented and amplified by the Commission's own Rules of Practice.

Section 3.72(b)(3) of the Rules, dealing with petitions to reopen and modify, provides (App. A, *infra*, p. 3a): "When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate; including hearings for the receipt of evidence by it or by a hearing examiner.[13]

Not only has the Federal Trade Commission refused to accord the hearing to which petitioner claims it was entitled, but the court of appeals has disclaimed authority to review the Commission's action. In consequence, petitioner—and every other party subject to a Commission order—is left without the recourse upon which it believed itself entitled to rely at the time consent was given to the order. This reliance—and with it, we submit, the effectiveness of the consent order procedure—is clearly jeopardized, if not destroyed, if the court of appeals' ruling is allowed to stand.

2. In a ruling that goes even beyond its disclaimer of statutory authority to review the Commission's action, and whose impact on the consent order procedure will be even greater and more widespread, the majority below also held the Commission's order deny-

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[13] The law is clear that modification opposed by a party subject to a consent order is improper without a hearing on the merits. *Hughes* v. *United States*, 342 U.S. 353, 357-58 (1952); *Liquid Carbonic Corp.* v. *United States*, 350 U.S. 868 (1955). As a matter of course, district courts grant evidentiary hearings on motions to modify outstanding consent orders before taking action thereon. See, *e.g.*, *United States* v. *International Boxing Club of New York, Inc.*, 220 F. Supp. 425 (S.D.N.Y. 1963); *United States* v. *Savannah Cotton & Naval Stores Exchange, Inc.*, 192 F. Supp. 253 (S.D. Ga. 1960); *United States* v. *Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960).

ing modification unreviewable because "the order which petitioner sought to modify is a consent order" and "by its consent to the order . . . the petitioner waived its objections to the terms of the order" (App. B, *infra*, pp. 8a, 9a). In so holding, the majority failed to recognize two critical distinctions: (1) the distinction between the question of *scope* of review and that of *jurisdiction* to review; and (2) the distinction between review on the *merits of a consent order* and review of Commission *action denying modification of a consent order.*

The majority rested its ruling on three cases (*Stewart* v. *Lincoln-Douglas Hotel Corp.*, 208 F.2d 379 (7th Cir. 1953); *In re 4145 Broadway Hotel Co.*, 100 F.2d 7 (7th Cir. 1938); and *Swift & Co.* v. *United States*, 276 U.S. 311 (1928)), none of which support its holding. *Stewart*, a non-antitrust action, held that consent to an order of dismissal barred the plaintiff from claiming error in the *entry* of the order before the court of appeals; the plaintiff had not sought relief from the order in the district court. In the *Broadway Hotel* case, also a non-antitrust action, a party to a consent injunctive order attempted, by direct appeal, to attack the order on jurisdictional and lack of consent grounds and the court of appeals in fact entertained the appeal, reviewed the questions raised, and affirmed the district court's judgment.

The *Swift* case, contrary to the court of appeals' ruling, stands directly for the proposition that federal appellate courts have jurisdiction to review orders denying motions for modification of antitrust consent decrees; the only question being whether the jurisdiction in that case rested in the court of appeals

or in the Supreme Court under the Expediting Act, 62 Stat. 989, 15 U.S.C. § 29 (276 U.S. at 321-323).[14]

Many other cases support the proposition that federal appellate courts have jurisdiction to review district court orders denying modification of consent decrees. See *United States* v. *Swift & Co.*, 367 U.S. 909 (1961), *affirming per curiam* 189 F. Supp. 885 (N.D. Ill. 1960) (antitrust action); *Turpentine & Rosin Factors, Inc.* v. *United States*, 365 U.S. 298 (1961), *affirming per curiam* 192 F. Supp. 256 (S.D. Ga. 1960) (antitrust action); *System Federation No. 91, Railway Employes' Department, AFL-CIO* v. *Wright*, 364 U.S. 642 (1961), *reversing* 272 F.2d 56 (6th Cir. 1959), *affirming* 165 F. Supp. 443 (W.D. Ky. 1958) (injunctive action under the Railway Labor Act); *United States* v. *International Harvester Co.*, 274 U.S. 693 (1927), *affirming* 10 F.2d 827 (D. Minn., undated) (antitrust action). Cf. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *Walling* v. *Harnischfeger Corp.*, 242 F.2d 712 (7th Cir. 1957), *affirming* 142 F. Supp. 202 (E.D. Wis. 1956).

While these cases involved review of district court orders denying motions for modification of consent

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[14] The petitioners in *Swift* had moved to vacate the district court's consent decree over four years after its entry. From the district court's order denying these motions, petitioners took appeals to the Court of Appeals for the District of Columbia and the government moved to dismiss the appeals for want of jurisdiction, claiming the appeals lay directly to the Supreme Court. On request of petitioners, the court of appeals transferred the appeals to the Supreme Court and this Court held the transfer proper under the Expediting Act, since the proceeding for modification was a part of the original antitrust action (276 U.S. at 321-23).

decrees, there is no basis for viewing review of Commission orders denying modification differently. Indeed, if anything, review of Commission orders would be more liberally available.

Lacking special statutory provisions governing modification of district court consent decrees, the courts look to reservation clauses or to the court's power to modify "by force of principles inherent in the jurisdiction of the chancery". *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). On the other hand, modification of Federal Trade Commission orders—consent or litigated—is governed by statute (15 U.S.C. § 21(b); 15 U.S.C. § 45(b)).[15] The applicability of these statutes is in no way altered by the fact that the order sought to be modified is a consent order rather than a litigated order. As pointed out, the Commission's rules specifically provide that a consent order "may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders," [16] and this provision is applicable whether modification is sought by the Commission or by a party subject to the order.[17] In accord with the Commission's rules, every consent order of the Commission contains a standard provision, as contained in the order against petitioners, as follows:

> The following order is agreed to be dispositive of all the issues in this case and may be entered

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[15] The standards for modification established by these statutes are more flexible than those ordinarily applied to district court consent decrees. See Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv.L.Rev. 1303, 1325-26 (1967).

[16] Federal Trade Commission Rules of Practice, Section 2.33, 32 Fed. Reg. 8448 (1967), App. A, *infra*, p. 1a.

[17] Federal Trade Commission Rules of Practice, Section 3.72(b)(2), 32 Fed. Reg. 8455-56 (1967), App. A, *infra*, pp. 2a-3a.

> in this proceeding by the Commission without further notice to respondent. When so entered, it shall have the same force and effect as if entered after a full hearing. *It may be altered, modified or set aside in the same manner, and within the same period provided by statute for other orders* (R. 38, emphasis added).

The language of this Court in *Abbott Laboratories* v. *Gardner*, —— U.S. ——, 18 L.ed. 2d 681, 686-87 (1967), dealing with the review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-704 (recodified in Public Law 89-554, 80 Stat. 378), is apposite here:

> The question [of availability of judicial review] is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. . . . [O]nly upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

The court of appeals clearly had jurisdiction to review the Commission's action denying modification.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1967

APPENDIX

APPENDIX

APPENDIX A

Rules Involved

(1) Section 2.33 of the Federal Trade Commission's Rules of Practice, 32 Fed. Reg. 8448 (1967), provides:

> Every [consent] agreement shall contain, in addition to an appropriate order, an admission of all jurisdictional facts and express waivers of further procedural steps, of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, and of all rights to seek judicial review or otherwise to challenge or contest the validity of the order. The agreement shall also contain provisions that the complaint may be used in construing the terms of the order; that the order shall have the same force and effect and shall become final and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders; that the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission; and that the Commission may withdraw its acceptance of the agreement if, within thirty (30) days after such acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate. In addition, the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.

(2) Section 3.72 of the Federal Trade Commission's Rules of Practice, 32 Fed. Reg. 8455 (1967), provides:

> (a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a peti-

tion for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will serve upon each person subject to such decision (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever any person subject to a decision containing a rule or order which has become effective, or an order to cease and desist which has become final, is of the opinion that changed conditions of fact or law require that said rule or order be altered, modi-

fied, or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose. The petition shall state the changes desired, the grounds therefor, and shall include, when available, such supporting evidence and argument as will in the absence of a contest provide the basis for a Commission decision on the petition. Within thirty (30) days after service of such a petition, the Director of the appropriate bureau of the Commission shall file an answer.

(3) Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. Unless otherwise ordered and insofar as practicable, hearings before a hearing examiner to receive evidence shall be conducted in accordance with Subparts B, C, D, and E of Part 3 of this chapter. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter.

APPENDIX B

Court of Appeals Opinion

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15618 SEPTEMBER TERM, 1966 — JANUARY SESSION, 1967

MARTIN MARIETTA CORPORATION, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition To Review an Order of the Federal Trade Commission Denying in Part Application for Modification of Order To Cease and Desist and Order of Divestiture.

APRIL 11, 1967

Before HASTINGS, *Chief Judge,* SCHNACKENBERG, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Martin Marietta Corporation petitions for review of an order of the Federal Trade Commission granting in part and denying in part a motion for modification of an order of divestiture previously entered by consent. The question presented concerns the reviewability of the Commission's order.

The Commission issued a complaint against the petitioner[1] in January 1961 charging that the petitioner's acquisition of various concrete pipe, cement, lime, and construction aggregates[2] properties was in violation of section 7 of the Clayton Act, 15 U.S.C. § 18, and section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

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[1] The complaint was issued against American-Marietta Company, Chicago, Illinois. The petitioner was formed by a statutory consolidation of American-Marietta and the Martin Company, Baltimore, Maryland, in October 1961.

[2] Crushed stone, sand, and gravel.

Negotiations between the petitioner and the Commission staff resulted in the execution of a consent agreement on February 5, 1963, which was effectuated by order of the Commission on March 12, 1963. The consent order, in part, required the petitoner to divest itself of sixty-one concrete pipe plants, thirteen construction-aggregates quarries or quarry sites, and two lime plants within a period of twenty-four months.[3]

In September 1964 the petitioner requested the Commission to modify the consent order by deleting eight of the thirteen quarries[4] from the divestiture provisions because of changed conditions of fact. The Commission's Bureau of Restraint of Trade responded to the petitioner's application, challenging the allegations contained in it. Subsequently, in March 1965, the petitioner filed a reply alleging additional information and submitted a request that the Commission permit oral argument "prior to any negative action" on the motion to modify. In December 1965, at the Commission's request, the reply was supplemented by the petitioner's current data, at which time the petitioner renewed its request to be heard orally prior to any unfavorable action.

On January 12, 1966, the Commission, without hearing argument, entered the order challenged in this proceeding. The order modified the earlier consent order by striking one quarry from the list of those required to be divested, but denied the petitioner's motion as to the remaining quarries, stating that "there has been no showing made

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[3] The petitioner divested itself of the concrete pipe plants and the lime plants, which had a combined book value of approximately $40,700,000.

[4] The total book value of the quarries was approximately $3,600,000. The book value of the eight quarries not divested is approximately $3,000,000.

that changed conditions of fact or law or the public interest warrant modification."[5]

The petitioner contends that the Commission's order must be set aside on review because, in denying the petitioner's motion to make additional modifications in the consent order, the Commission did not afford the petitioner an evidentiary hearing with respect to the seven quarries not deleted and did not comply with its own rules regarding the procedure for modifying existing orders. The Commission, on the other hand, contends that insofar as its order denies the petitioner's motion to modify the consent order it is not subject to review by this court. We agree with the Commission.

The pertinent statutory provisions relating to modification of the Commission's orders after the time for review has elapsed are section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), whose terms are identical in all important respects. Section 5(b) of the Federal Trade Commission Act provides in part:

> After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That

[5] The petitioner's subsequent motion for reconsideration and for an evidentiary hearing "to resolve . . . factual disputes" was also denied by the Commission, with the statement that "even if the facts set forth by [petitioner] in its application to modify the consent order are taken as true, there has been no showing made that changed conditions of fact or law or the public interest warrant modification. . . ."

> the said person, partnership or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

The "review" which may be obtained under this section is a review of the "order entered after . . . reopening," not a review of the original order. The review must therefore confine itself to the modifying order, more specifically, to that portion of the order which effects changes in the original order.

The portion of an "order entered after . . . reopening" which refuses any further modification of the original order is not reviewable. Any other interpretation of the statute is logically inconsistent with the finality of the original order. Further, a different construction would place the Commission in a position which we think Congress did not intend. Neither the Federal Trade Commission Act nor the Clayton Act provides for review by courts of appeals of any action of the Commission denying a motion to reopen or modify a final order. If the Commission had summarily denied the petitioner's motion, its action would not be subject to review. If, on the other hand, by modifying in one particular an order previously entered the Commission thereby opens its previous order to a second review in all particulars challenged, the Commission is faced with a dilemma; it is likely to be discouraged from granting relief which it is not obliged to extend but which it might otherwise grant, at least in part, at the request of persons bound by orders which have become final.

We think the statute was intended to provide judicial review of action taken by the Commission which is unfavorable to or is resisted by a person subject to an existing order. It is for this reason that the statute requires

the Commission to provide "notice and opportunity for hearing" prior to modifying such an order. In the instant case, the only modification occurred as a result of the petitioner's request, and the petitioner does not object that a portion of its request was granted. The petitioner's objection is that its request was not granted in its entirety. It seeks a review of the Commission's refusal to make further modifications in the consent order, or at least a review of the Commission's refusal to grant the petitioner a hearing with respect to the additional modifications the petitioner requested. The petitioner has no right to such review.

There is another reason, aside from the lack of statutory authority, why the Commission's order is not reviewable. The order which the petitioner sought to modify is a consent order. The agreement reached by the petitioner and the Commission prior to the entry of the consent order states in part:

> Upon entry of this consent order, [petitioner] waives any further procedural steps before the hearing examiner and the Commission, a statement of findings of fact and conclusions of law, and all of the rights it may have to challenge or contest the validity of the order to divest and to cease and desist entered in accordance with this agreement.[6]

The order entered pursuant to this agreement is therefore basically similar to a consent decree entered by a court. The scope of review of consent decrees is extremely narrow. *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 208 F.2d 379 (7th Cir. 1953). "Ordinarily a party to a consent decree cannot question its validity on appeal, if the court had jurisdiction to enter the decree, unless there are facts

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[6] The agreement also provides that the consent order "is agreed to be dispositive of all the issues in this case," and adds that "it may be altered, modified or set aside in the same manner and within the same period provided by statute for other orders."

which nullify the consent." *In re 4145 Broadway Hotel Co.*, 100 F.2d 7, 8 (7th Cir. 1938). In *Swift & Co.* v. *United States*, 276 U.S. 311 (1928), the Supreme Court affirmed an order of the Supreme Court of the District of Columbia overruling motions to vacate a consent decree entered four years earlier. The Court stated:

> The decree sought to be vacated was entered with the defendants' consent. . . . [A] decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause. . . . Where, as here, the attack is not by appeal or by bill or review, but by a motion to vacate, filed more than four years after the entry of the decree, the scope of enquiry may be even narrower. *Id.* at 323-24.

The petitioner did not seek review of the consent order when it was entered and does not now challenge the Commission's jurisdiction over the subject matter or allege lack of consent. The petitioner asks us to review the Commission's refusal to vacate a portion of the order. By its consent to the order, however, the petitioner waived its objections to the terms of the order. The petitioner may not challenge the Commission's refusal to modify those terms.[7]

The petition for review is dismissed.

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[7] The difficulty of reviewing the denial of the petitioner's motion to modify the consent order should also be noted. Because the matter was not contested, and as stated in the consent agreement, "the record on which the decision of the Commission . . . shall be based shall consist solely of the complaint and this agreement." The facts upon which the Commission relied in issuing its complaint and which prompted the petitioner to enter the consent agreement are therefore not available to us in determining whether the Commission erred or otherwise abused its discretion in refusing to modify the consent order on the basis of "changed conditions of fact." This is another indication why the Commission's order is not reviewable. *Cf., Swift & Co.* v. *United States*, 276 U.S. 311, 327, 329 (1928).

No. 15618

Circuit Judge SCHNACKENBERG, dissenting.

Because of the unusual manner in which the Commission disposed of Martin Marietta Corporation's petition, without a hearing, I feel that the spirit as well as the letter of the law were violated. Federal Trade Commission Act, Section 5 (b), 15 U.S.C. § 45 (b), and the Clayton Act, as amended, Section 11 (b), 15 U.S.C. § 21 (b); Administrative Procedure Act, Sections 5, 7 and 8, 5 U.S.C. §§ 1004, 1006, 1007. See also Rules of the Commission, 16 C.F.R. § 3.28.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Tuesday, April 11, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

No. 15618

Martin Marietta Corporation, *Petitioner,*

v.

Federal Trade Commission, *Respondent.*

Petition for review of an order of the Federal Trade Commission.

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the said petition for review of an order entered by the Federal Trade Commission on January 12, 1966, be, and the same is hereby Dismissed, in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

APPENDIX D

Court of Appeals Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
Monday, May 8, 1967

Before

HON. JOHN S. HASTINGS, Chief Judge
HON. WIN G. KNOCH, Circuit Judge
HON. ROGER J. KILEY, Circuit Judge
HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. WALTER J. CUMMINGS, JR., Circuit Judge

No. 15618

MARTIN MARIETTA CORPORATION, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Petition for review of an order of the Federal Trade Commission.

IT IS ORDERED that the petition for rehearing *en banc* of the above entitled cause be, and the same is hereby DENIED. (Judges Schnackenberg, Kiley and Cummings voted to grant the petition for rehearing *en banc*).

APPENDIX E

Court of Appeals Final Decree

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 15,618

MARTIN MARIETTA CORPORATION, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

FINAL DECREE

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the said petition for review of an order entered by the Federal Trade Commission on January 12, 1966, be, and the same is hereby DISMISSED, in accordance with the opinion of this Court filed April 11, 1967.

By the Court.

/s/ JOHN S. HASTINGS
/s/ ELMER J. SCHNACKENBERG
/s/ LUTHER M. SWYGERT
United States Circuit Judges

U.S.C.A. 7th Circuit
Filed May 22, 1967
KENNETH J. CARRICK, Clerk

A True Copy:
Teste:
KENNETH J. CARRICK, Clerk
ADAM A. COCHRAN, Deputy Clerk
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

Entered: May 22, 1967